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No. 87-705

Supreme Court, U.S.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

UNION PACIFIC RAILROAD COMPANY, UNION
PACIFIC CORPORATION, MISSOURI PACIFIC
RAILROAD COMPANY, KANSAS CITY SOUTHERN
INDUSTRIES, INC., KANSAS CITY SOUTHERN
RAILWAY COMPANY, BURLINGTON NORTHERN,
INC., BURLINGTON NORTHERN RAILROAD COM-
PANY, AND CHICAGO AND NORTH WESTERN
TRANSPORTATION COMPANY,

Petitioners,

vs.

ENERGY TRANSPORTATION SYSTEMS, INC., AND
ETSI PIPELINE PROJECT, A JOINT VENTURE,
ET AL.,

Respondents.

BRIEF FOR THE STATE OF MISSOURI AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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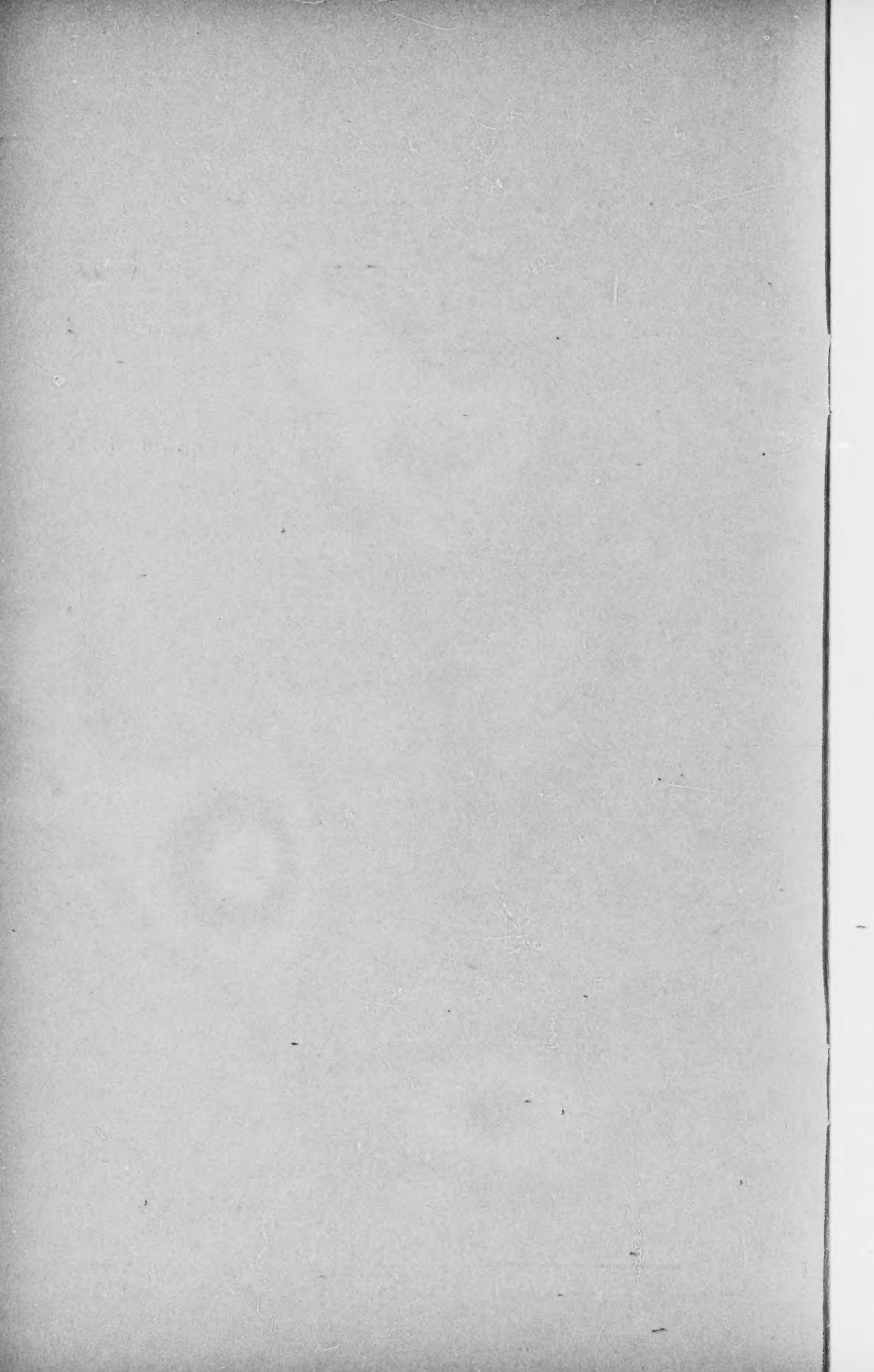


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**BRIEF FOR THE STATE OF MISSOURI AS AMICUS
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OF CERTIORARI**

The state of Missouri as *amicus curiae* pursuant to Supreme Court Rule 36.4 urges that this Court grant the petition for a writ of certiorari in the above-captioned case in order to review the decision of the United States Court of Appeals for the Fifth Circuit in its Case No. 87-2177, *In re Burlington Northern, Inc.*, 822 F.2d 518 (5th Cir. 1987).

The interests of the state of Missouri are two-fold. First, the state believes that the attorney work product and attorney-client privileges have been subverted by the decision below. Secondly, the state believes that disclosure of its work product to an adverse party in pending litigation is without justification and may work unjust hardships on the state in that litigation. Moreover, disclosure of that work product may have the same impacts of the case styled *State of South Dakota v. State of Nebraska, State of Iowa and State of Missouri*, Case No. 103 Original, should this Court grant the pending renewed motion to file a complaint by the state of South Dakota.

The decision below would chill the ability of litigants and their attorneys from frank discussion about litigation and would chill the ability of friendly co-counsel from similar discussions among attorneys. The likelihood that records of discussions among co-counsel and shared written material analyzing issues could be obtained by adverse parties through discovery in subsequent proceedings would reduce such cooperation and cause such cooperation to be nearly non-existent. Such a result would lead to more lengthy trial preparation, trial time, and number of cases brought in an already over-burdened court system.

The state believes that disclosure of privileged documents such as draft briefs, legal memoranda, draft complaints, notes and correspondence prepared by state attorneys and officials, and other documents containing their privileged work product, relating to *Missouri v. Andrews*, 586 F. Supp. 1268 (D. Neb. 1984), *aff'd*, 787 F.2d 270 (8th Cir. 1986) and under submission to this Court in Case Nos. 86-939 and 86-941 would be completely inappro-

priate. Moreover, the very real possibility exists that if disclosure of privileged documents is made, that issues in *Missouri v. Andrews* may be litigated in the case below without the participation of plaintiff states and defendant federal government agencies and officials.

The state will not burden this Court with a summary of the proceedings in *Missouri v. Andrews*, because this Court is well aware of those activities. However, in the course of preparing their case, attorneys for the state conferred with attorneys for Kansas City Southern, which was a friendly litigant. The attorneys exchanged draft pleadings, motions, briefs, legal memoranda, and correspondence concerning the case. ETSI has admitted that all of these documents are privileged attorney work product, and most of them are opinion work product, which enjoys nearly absolute immunity from discovery.

The Fifth Circuit decision, if allowed to stand, may allow production of *this state's work product*, even though there has been absolutely no showing that the state action fits within any exception to the privileges. The Court did state in footnote 12 of its decision that it was confident that the district court would safeguard privileges asserted by parties to *Andrews* including this state. However, the decision of the Fifth Circuit does not guarantee those protections, As a result, this state respectfully

requests this Court to grant the petition for writ of certiorari.

Respectfully submitted,

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